

CRP 250/2007
BEFORE
THE HON'BLE MR. JUSTICE IA ANSARI
JUDGMENT & ORDER

In this revision stands challenged the judgment and order, dated 16.08.2007, passed by the learned Sessions Judge, Sonitpur, Tezpur, in Criminal Appeal No.42(S-4)/2006, whereby the learned Sessions Judge, Sonitpur, has upheld the judgment and order, dated 15.11.2006, passed, in GR Case No.231/2002, by the learned Sub-Divisional Judicial Magistrate, (M), Biswanath Chariali, convicting the accused-petitioner under Section 498A IPC and sentencing him to suffer rigorous imprisonment for three years and pay fine of Rs.5,000/- and, in default of payment of fine, suffer simple imprisonment for a further period of six months.

2. The case of the prosecution, as unfolded at the trial, may, in brief, be described thus:

(i) Smti MS is a legally wedded wife of the accused-petitioner, their marriage having been solemnized, on 03.07.97, according to Hindu rites and customs. After her marriage, MS stayed with the accused as her husband at his house situated in village Baliyan, Bilotia. After about six months of her marriage with the accused-petitioner, he started asking, on one plea or another, MS to bring money from her parents. On some occasions, MS did bring small amounts of money from her father and handed over the same to her husband. The members of the family of MS's husband started ridiculing and teasing MS by saying that the properties given to her, at the time of her marriage, by her parents were sub-standard. Gradually, MS's husband and in-laws started not only abusing MS, but also started calling her parents by various names, such as, monster, devil, etc. In course of time, MS was told by her husband that he would bring a second wife and that she (MS) should give consent for a second marriage as she was unable to bear any child for him. On 06.05.2002, MS was asked to bring Rs.70,000/- from her parental house and she was threatened with dire consequences if she failed to bring, within 14.05.2002, the money, so demanded. On 10.05.2002, MS's husband called a 'mel' (i.e., sitting of the elders for settlement of disputes) and put pressure, with the help of some of his co-villagers, on MS to give her consent to her husband performing a second marriage. In the meeting, so held, as MS declined to give her consent, several restrictions were put on her in retaliation inasmuch as she was asked not to use any room other than the room, which had been provided to her for her dining and sleeping, no one would be allowed to visit her and that she would have to leave for her school at 8.30 am and be back home by 5 pm. At night, her room was kept locked from outside. In fact, on 10.05.2002, when MS came to know that a 'mel' would be called, she made a representation to Choyduar Nari Suraksha Samitee, which is an organization for protecting women from the cruelty and harassment; but before the said Samity could take effective steps, MS was reminded, on 13.05.2002, by her husband that she would have to pay Rs.70,000/- by 14.05.2002. Even MS's gold ornaments were taken away forcibly from her. Unable to bear what she was being subjected to, MS went to her school on 14.05.2002, where she was working, and taking leave from the Principal of the school, she went to Gohpur Police Station and lodged there an Ejahar informing the police about what she was being made to undergo, Ext.1 being the said Ejahar. Treating this Ejahar as FIR, a case was registered by the police. After lodging the FIR, MS went to her parental house and has remained there since then. On completion of investigation, police laid charge-sheet against MS's husband, i.e., the accused-petitioner, and some of his relatives.

(ii) To the charge framed against them under Section 498A IPC, all the accused pleaded not guilty. In support of their case, prosecution examined as many as 17 witnesses. Having found MS's husband guilty of the charge framed against him under Section 498A IPC, the learned trial Court convicted him accordingly and passed sentence against him as mentioned hereinabove. The remaining accused were, however, acquitted. Aggrieved by his conviction and the sentence passed against

him, MS's husband preferred an appeal, which, as already indicated hereinabove, stands disallowed. It is, in these circumstances, that the accused-petitioner has impugned his conviction and the sentence passed against him in the present revision.

3. I have heard Mr. AK Bhattacharjee, learned Senior counsel, appearing on behalf of the accused-petitioner, and Mr. K. Munir, learned Addl. Public Prosecutor, Assam.

4. Appearing on behalf of the accused-petitioner, Mr. Bhattacharjee, learned Senior counsel, has pointed out that to the accusations made against the accused-petitioner that he had subjected his wife to cruelty, there is no direct evidence except that of the wife of the accused-petitioner and as far as the evidence given by remaining witnesses are concerned, these are all hearsay pieces of evidence inasmuch as the accused-petitioner's wife (PW2) has, nowhere, revealed, in her evidence, the name(s) of any person(s), who had been reported by her about the harassment, which she was undergoing, and the demands for money, which were being raised. In the face of such silence of PW2, points out Mr. Bhattacharjee, the evidence given by the remaining witnesses as to what PW2 had reported to them as regards the cruelty, which she was being allegedly subjected to, is nothing, but hearsay. However, the learned Courts below, submits Mr. Bhattacharjee, relied heavily upon such hearsay evidence and derived great support from such inadmissible pieces of evidence for coming to the conclusion that the evidence given by PW2 is credible and trustworthy. If hearsay pieces of evidence are kept excluded from consideration, contends Mr. Bhattacharjee, there remains only the evidence of PW2 and her sole evidence is, in itself, not sufficient to warrant conviction of the accused-petitioner. It is also pointed out by Mr. Bhattacharjee that the examination of the accused-petitioner, under Section 313 Cr.PC, was wholly inadequate inasmuch as none of the incriminating pieces of evidence given by the witnesses, other than PW2, were put to the accused-petitioner, while he was being examined under Section 313 Cr.PC and, hence, without eliciting the accused-petitioner's response to the circumstances, which appeared to the learned trial Court to be incriminating, the evidence given by these witnesses could not have been relied upon to form conviction of the accused-petitioner thereon.

5. Reacting to the submissions made on behalf of the accused-petitioner, it is submitted by Mr. Munir, learned Additional Public Prosecutor, that the evidence of PW2, when considered in conjunction with the evidence given by the other witnesses, it becomes transparent that PW2 had been subjected to cruelty within the meaning of Section 498A IPC and, hence, conviction of the accused-petitioner deserves to be maintained.

6. While considering the present revision, what needs to be noted is that the present case is not one of those cases, where conviction is based on no evidence at all. It is, no doubt, true, as pointed by Mr. Bhattacharjee, that the evidence given by PW3, who is brother of PW2, PW6, who works in Kanaklata Adarsha School and who claims to have forwarded PW2's representation made against her husband and the relatives of her husband to the President, Nari Suraksha Samitee, PW7, who is known to both PW2 as well as her husband, PW8, a friend of PW2's brother, PW13, who was, at the relevant point of time, holding charge of the office of the President of Chayduar Nari Suraksha Samitee, PW14, a brother of PW2, have all deposed to the effect that they had come to know from PW2 that she was being subjected to cruelty by raising various demands for money, by making accusation that she was unable to bear a child for her husband and by putting pressure on her to give her consent for a second marriage of her husband. The evidence, so given, by all these witnesses is, undoubtedly, hearsay, for, they are, admittedly, not eye witnesses to the alleged harassment of PW2 and their clear assertion is that they had come to know about PW2's harassment on being reported by her to them; whereas there is no distinct and clear assertion, in the evidence of PW2, that she had reported the occurrence to any of these witnesses.

7. What is, now, of utmost importance to note is that a trial Judge is not merely a recording machine of evidence given by the witnesses nor can he be a silent spectator to the evidence produced by the parties. Though a trial Judge must not drop the mantle of a Judge and assume the role of a prosecutor or a defence counsel, the fact remains that his duty is to reach the truth and Section 165 of the Evidence Act gives the Judge adequate power and authority to put any question to any witness at any time - be it during the course of examination-in-chief or cross-examination or at the end of any such examination or re-examination - which, to the Judge, appears to be necessary for a just decision of the case and in order to discover or obtain proof of relevant fact. Though a Judge must not usurp the function of a counsel, he needs to participate, in the trial, in such a manner as would ensure that the evidence, adduced by the parties, is legal and such evidence becomes clear, complete and intelligible. A Judge, who merely sits at a trial and records evidence without caring to conduct examination of the witnesses in order to ensure that evidence on record becomes intelligible, must be held to have not performed his duty as warranted by law. A Judge is not merely an observer. It is his duty to explore, within permissible limits, the truth. If, therefore, a Judge finds that the examination of a witness is not being conducted in such a way as to unfold complete truth, it is not only right for the Judge, but his duty to intervene and put such questions as may be warranted and permissible within the ambit of Section 165. A Judge cannot behave like a passive agent, when a case is tried before him. He has the power and also the duty to question the witnesses in order to elicit relevant materials. A case cannot be allowed to suffer for failure of any of the parties to elicit relevant materials from a witness. It is to discover the truth and bring, on record, the relevant facts that a Judge has been vested with the power to put questions under Section 165. It is with this object in view that the Judge has been vested with the power to call any witness or recall any witness at any time suo moto or at the instance of any of the parties if it becomes necessary for a just decision of the case. If the prosecution omits to bring out any relevant fact or the defence elicits from a witness, in the cross-examination, a statement, which is obscure or incomplete, the defence does not acquire (the Judge must bear in mind) a vested right in such limited cross-examination. It is the duty of the Judge to remove such obscurity or incompleteness by putting appropriate question. In such a case, it is, rather, the duty of the Judge, conducting the trial, to elicit from the witness complete information so that the evidence given by him or her becomes clear and intelligible, though his putting of questions cannot be in a manner as if the witness is under cross-examination nor can such examination be aimed at destroying or diluting the effect of the cross-examination of the witness by the defence. It is for this reason that a Court shall not put, in exercise of its powers under Section 165, leading question or put words into the mouth of the witness.

8. Bearing in mind the position of law with regard to a court's duty to put to a witness any such question, which is necessary for the purpose of bringing, on record, a relevant fact or to bring, on record, the proof of a relevant fact, when I turn to the case at hand, what attracts the eyes, most prominently, is that in her examination-in-chief, nothing was stated by PW2 to indicate if she had reported the demand for money raised by the accused-petitioner or had reported about the various restrictions, which were being put on her, or the harassment, which she was alleged to have been undergoing at the house of the accused-petitioner. In her cross-examination, however, she deposed, Each time I went to my house, I had told about the tortures inflicted on me by my husband. The defence did not elicit from PW2, as to who were the persons to whom she had reported about the torture inflicted on her. In this backdrop, when the evidence of PWs 6, 7, 8, 13 and 14 is that they had been reported by PW2 about the cruelty that she was being subjected to, it became the duty of the learned trial Court to elicit from PW2 as to who were the person(s) whom she had reported each time she had gone to her parental home. The evidence given by PW2, in her cross-examination, that each time, she went to her home, she reported the torture inflicted on her by

y her husband is completely vague and obscure, for, the evidence, so given, did not indicate as to who were the person(s) to whom she had reported about the torture, which was being perpetrated on her. In these circumstances, as already indicated hereinbefore, it was the duty of the learned trial Court to elicit, by putting appropriate questions, as to who were the person(s) to whom she had told about the torture inflicted on her by her husband. Failure to put relevant questions to PW2 was a serious lapse on the part of the learned trial Court. If the clarification is not taken from PW2, the evidence given by PWs 6, 7, 8, 13 and 14 remains completely hearsay. Considered thus, it is clear that failure to elicit relevant facts from PW2, in the circumstances as indicated hereinbefore, would cause serious miscarriage of justice if this lapse is allowed to continue.

9. What emerges from the above discussions is that if relevant facts, as pointed out above, are not elicited from PW2, the evidence given by PWs 6, 7, 8, 13 and 14 would remain hearsay. Logically, therefore, PW2 ought to have been recalled by the learned trial Court and relevant questions ought to have been put to her for arriving at a fair and just decision of the case, for, not re-calling PW2 would result in serious miscarriage of justice. This aspect of the case appears to have not been taken into account by the learned appellate Court. The learned appellate Court ought to have set aside the conviction of the accused-petitioner and ought to have remanded the case to the learned trial Court with direction to re-call PW2 and elicit from her as to who were the persons to whom she had reported, each time she went home, about the torture inflicted on her by her husband.

10. An apprehension has been expressed by Mr. Bhattacharjee, learned Senior counsel, that any such re-calling of PW2 would enable the prosecution to fill up the lacuna. While considering this submission, it needs to be pointed out that the duty of the Court is to discover the truth and obtain proof of relevant facts. The question as to whether PW2 had reported to anyone about what she alleges to have been undergoing, at her matrimonial house, is, undoubtedly, a relevant fact and this relevant fact necessitates putting of appropriate questions to PW2 by the Court in exercise of its power under Section 165, when the prosecution has not discharged its duty in this regard. Explaining as to what can be regarded as a lacuna in a prosecution's case, the Apex Court, in *Rajendra Prasad Vs. Narcotic Cell*, reported in (1999) 6 SCC 110, observed :

7. It is a common experience in criminal courts that defence counsel would raise objections whenever courts exercise powers under Section 311 of the Code of Criminal Procedure or under Section 165 of the Evidence Act, 1872 by saying that the court could not fill the lacuna in the prosecution case. A lacuna in the prosecution is not to be equated with the fallout of an oversight committed by a Public Prosecutor or during trial, either in producing relevant materials or in eliciting relevant answers from witnesses. The adage to err is human is the recognition of the possibility of making mistakes to which humans are prone. A corollary of any such lapses or mistakes during the conducting of a case cannot be understood as a lacuna which a court cannot fill up.

8. Lacuna in the prosecution must be understood as the inherent weakness or a latent wedge in the matrix of the prosecution case. The advantage of it should normally go to the accused in the trial of the case, but an oversight in the management of the prosecution cannot be treated as irreparable lacuna. No party in a trial can be foreclosed from correcting errors. If proper evidence was not adduced or a relevant material was not brought on record due to any inadvertence, the court should be magnanimous in permitting such mistakes to be rectified. After all, function of the criminal court is administration of criminal justice and not to count errors committed by the parties or to find out and declare who among the parties performed better.

9. The very same decision *Mohanlal Shamji Soni v. Union of India* 1 which cautioned against filling up lacuna has also laid down the ratio thus: (AIR Headnote)

It is therefore clear that the criminal court has ample power to summon any person as a witness or recall and re-examine any such person even if the evidence on both sides is closed and the jurisdiction of the court must obviously be dictated by exigency of the situation, and fair play and good sense appear to be the only safe guides and that only the requirements of justice command the examination of any person which would depend on the facts and circumstances of each case.

10. Dealing with the corresponding section in the old Code (Section 540) Hidayatullah, J. (as the learned Chief Justice then was) speaking for a three-Judge Bench of this Court had said in *Jamatraj Kewalji Govani v. State of Maharashtra* 2 a s follows:

It would appear that in our criminal jurisdiction, statutory law confers a power in absolute terms to be exercised at any stage of the trial to summon a witness or examine one present in court or to recall a witness already examined, and makes this the duty and obligation of the court provided the just decision of the case demands it. In other words, where the court exercises the power under the second part, the enquiry cannot be whether the accused has brought anything suddenly or unexpectedly but whether the court is right in thinking that the new evidence is needed by it for a just decision of the case.

11. Chinnappa Reddy, J. has also observed in the same tone in *Ram Chander v. State of Haryana*.

12. We cannot therefore accept the contention of the appellant as a legal proposition that the court cannot exercise power of resummoning any witness if once that power was exercised, nor can the power be whittled down merely on the ground that the prosecution discovered laches only when the defence highlighted them during final arguments. The power of the court is plenary to summon or even recall any witness at any stage of the case if the court considers it necessary for a just decision. The steps which the trial court permitted in this case for resummoning certain witnesses cannot therefore be spurned down or frowned at. (Emphasis is supplied)

11. From the observations made in *Rajendra Prasad's* case (supra), it clearly transpires that lacuna in a case of prosecution or defence would mean an inherent and not accidental slip or omission nor does lacuna mean patent wedge, but a latent wedge. An oversight or inefficiency in the management of a case is not a lacuna. In the present case too, the prosecution's failure to obtain information from PW2 as to whom she had reported the happenings of her matrimonial house is a failure of management of the case by the prosecution and not an inherent weakness of its case, for, unless the prosecution puts appropriate questions to PW2, she cannot give requisite answers and for the failure of the prosecution to put necessary questions to its witness, the witness's evidence cannot be thrown out. It is in such cases that a Judge's role, as indicated above, arises under Section 165, Evidence Act. It may also be pointed out that Section 311 CrPC, which empowers a Judge, in a criminal trial, to call or re-call a witness is one of the facets of his powers under Section 165, Evidence Act, and the Judge must ensure that he does what is necessitated for a just decision of a case bearing, of course, in his mind the recognized limitations within which such power has to be exercised.

12. In fact, emphasizing what role a Judge should play in a trial, the Apex Court, in *Shakila Abdul Gafar Khan v. Vasant Raghunath Dhoble*, reported in (2003) 7 SCC 749, observed :

34. The courts exist for doing justice to the persons who are affected. The trial/first appellate courts cannot get swayed by abstract technicalities and close their eyes to factors which need to be positively probed and noticed. The court is not merely to act as a tape recorder recording evidence, overlooking the object of trial i.e. to get at the truth, and oblivious to the active role to be played for which there is not only ample scope but sufficient powers conferred under the Code. It has a greater duty and responsibility i.e. to render justice in a case where the role of the prosecuting agency itself is put in issue. (Emphasis is supplied)

13. From the position of law laid down in *Shakila Abdul Gafar Khan*(supra), i

t becomes transparent that a Court is not a tape recorder, which has to merely record evidence. Far from this, when the Court's object is to do justice, it cannot overlook the necessity to reach the truth. Hence, while a Court cannot assume the role of a party to a case, it nevertheless has the duty to remove vagueness or obscurity from a witness's evidence so that the evidence becomes intelligible to a Court of law.

14. There is yet another circumstance, which needs some observations by this Court. As has been correctly pointed out by Mr. Bhattacharjee, learned Senior counsel, the learned trial Court has heavily relied upon the evidence of not only PW2, but of other witnesses too; but it was only the evidence of PW2, which was put to the accused-petitioner, while he was being examined under Section 313 Cr.P.C. It is time to remind ourselves that examination of an accused, under Section 313 (2) Cr.P.C., is not a mere formality or technical compliance, but a solemn duty of a trial Court, for, such examination enables an accused to offer any explanation, if he has, with regard to any piece of evidence, which appears to be incriminating against him. It is, therefore, the duty of every trial Court to put to the accused every piece of incriminating evidence, which comes on record against the accused and his response thereto shall be recorded. If a piece of evidence has not been put to the accused, while he is examined under Section 313 Cr.P.C., such a piece of evidence cannot be relied upon or made basis for the purpose of founding conviction of the accused. The accused is, however, free to say anything or even not to reply to the question(s) put to him and it would remain open for the trial Court to draw such inference from the response of the accused as may be justified in the circumstances of a given case.

15. What crystallizes from the above discussion is that in the face of the evidence on record and the manner in which the trial was conducted, conviction of the accused-petitioner cannot be sustained. If, at the same time, his conviction is interfered with and he is acquitted, the case against the accused-petitioner fails, because of the prosecution's inability to conduct the prosecution properly and because of the lapse, on the part of the trial Court, to conduct the trial in accordance with law. The result of a trial cannot be made dependant on the quality of the counsel engaged, whether by prosecution or by the defence, or on the quality of the Judge presiding over the trial, for, in a criminal trial, it is, ultimately, the responsibility of the Court, even in adversial system to discover the truth and do justice, though in its duty to do justice, the Judge cannot drop the mantle of a Judge and take upon itself the role of the prosecutor or of the defence counsel.

16. In the result and for the reasons discussed above, this revision partly succeeds. The conviction of the accused-petitioner and the sentence passed against him are hereby set aside. The impugned judgments and orders, dated 16.08.2007 as well as 15.11.2006, shall accordingly set aside. The case is remanded to the learned trial Court with direction to re-call PW2 and put to her appropriate questions as may be warranted in the facts and circumstances of the present case and as indicated hereinabove. After examination of PW2 in accordance with law, the learned trial Court shall be free to re-call any such other witness or witnesses, whose examination may, in the interest of justice, be sought to be done by the defence for further cross-examination in the light of the evidence, which PW2 may give.

17. In order to avoid delay in the disposal of the case, the accused-petitioner is hereby directed to appear in the Court of the Sub-Divisional Judicial Magistrate, (M), Biswanath Chariali, within two weeks from to-day and upon his appearance, the learned trial Court shall deal with the case and dispose of the same in accordance with law and in the light of the observations made and the directions given in the preceding paragraphs of this judgment and order.

